

FILED
Court of Appeals
Division II
State of Washington
8/25/2022 4:59 PM

No. 56436-0-II

**IN THE COURT OF APPEALS
OF THE STATE OF WASHINGTON
DIVISION II**

ARMIN W KAST DBA KAST PAINTING & LIGHT
CONSTRUCTION,

Appellant,

v.

THE DEPARTMENT OF
LABOR AND INDUSTRIES
OF THE STATE OF WASHINGTON,

Respondents.

APPELLANT'S BRIEF

TABLE OF CONTENTS

| | | |
|------|---|----|
| I. | OVERVIEW | 4 |
| II. | STATEMENT OF THE CASE | 5 |
| III. | STATEMENT OF THE ISSUES | 8 |
| IV. | ARGUMENT | 8 |
| | A. The Timely Appeal of the Citation | 10 |
| | B. The Department Should be Estopped from Arguing Defect in Service Constitutes an Untimely Appeal | 12 |
| V. | CONCLUSION | 16 |

TABLE OF AUTHORITIES

Cases

| | |
|---|----|
| <i>Black v Dep't of Labor & Indus.</i> , 131 Wn.2d 547, 552, 933 P.2d 1025 (1997)..... | 10 |
| <i>Kramarevcky v. Department of Social and Health Servs.</i> , 122 Wash.2d 738, 743, 863 P.2d 535 (1993) | 13 |

Statutes

| | |
|------------------------|---------------------|
| RCW 49.17.140(1) | 4, 8, 9, 10, 11, 12 |
|------------------------|---------------------|

OVERVIEW

This appeal arises from a Citation and Notice (317950632) dated December 19, 2018 and sent to Kast Painting and Light Construction (Appellant – to be referred to as Kast) by the Department of Labor and Industries (Respondent – to be referred to as the Department). It was received by Kast on December 21, 2018. Under RCW 49.17.140, the employer has fifteen working days within which to notify the director that the employer wishes to appeal the citation or assessment of penalty. Kast submitted his appeal to the citation via e-mail, but the Department determined the appeal was untimely, and issued an order finding the same, thereby preventing the Appellant an opportunity to have the underlying case heard.

The issue in this case is whether the Appellant's January 8, 2019, electronically submitted appeal complied with the requirements of the statute and therefore represents a timely appeal.

STATEMENT OF THE CASE

The Department of Labor and Industries mailed a Citation and Notice to Kast Painting and Light Construction dated December 19, 2018. The Citation was received by Armin Kast on December 21, 2018. (Board of Industrial Insurance Appeals Docket #19 W1061 Proposed Decision and Order [BIIA] page 1) Kast disagreed with the Citation and wanted to appeal, and on January 8, 2019, within the prescribed period, electronically filed an appeal. (BIIA page 1)

Unfortunately, this e-mailed appeal contained a typographical error in the username portion of the email, addressed to DOSHApeals@Lni.wa.gov. (BIIA page 1) Despite this error, the appeal was received at the Department on the date it was sent, January 8, 2019, as it was properly addressed to the Department's domain name. (BIIA page 2) Kast routinely submits quarterly and annual reports to the Department and receives an electronic acknowledgement of receipt of the

submittal. No non-deliverable or similar message was sent when the appeal was submitted electronically. (BIIA page 2)

On January 24, 2019, after Kast had not heard anything from the Department, he again sent the email, this time including Compliance Officer Lisa Van Loo as an additional recipient. (BIIA page 1) It was at this time that Kast discovered that there had been an error in the user-name portion of the email address to the Department.

This resubmitted appeal was sent more than 15 days after the Citation was issued. The Department determined that the resubmitted appeal was not timely, and therefore denied the appeal.

Kast appealed this decision to the Board of Industrial Insurance Appeals. On August 1, 2019, Industrial Appeals Judge Jeffrey A Friedman issued a Proposed Decision and Order (BIAA Docket No. 19W 1061) that affirmed the Department's denial of the appeal because it was not submitted timely. (BIAA page 3) It should be noted that the judge stated that Kast made a

good faith effort to file the appeal on time. He also noted that “It would be helpful if the Department’s email system was configured to send undeliverable responses when an incorrect address is used, or to send an automatic reply when an email is received. This would be beneficial for everyone but would especially benefit people like Mr. Kast who is dyslexic and may have more difficulty catching his typographical mistakes.” (BIAA Page 2) The Appellant filed a Petition for Review of this decision. (Petition for Review letter from Kast dated August 20, 2019) The Board granted review, and the Petition for Review was denied on September 4, 2019. (BIAA Order Denying Petition for Review page 1)

Kast appealed that decision to Lewis County Superior Court. The Honorable James W Lawler heard oral arguments from the parties on August 27, 2021. Following the arguments, Judge Lawler issued Findings of Fact and Conclusions of Law and Judgement (Clerk’s Action CA) on August 30, 2021, affirming the September 4, 2019, Board of Industrial Insurance

Appeals decision that found Kast's appeal untimely. (CA page 3)

This appeal followed.

STATEMENT OF THE ISSUES

1. Whether the January 8, 2019, appeal filed by the Appellant in response to the December 19, 2018, citation was received by the Department of Labor and Industries by electronic correspondence (email) and substantially complied with the statutory and regulatory requirements in filing its appeal?
2. Whether the Department should be estopped from denying an appeal based on the specific facts and circumstances of this case?

I. ARGUMENT

Under RCW 49.17.140(1):

If after an inspection or investigation the director or the director's authorized representative issues a citation under the authority of RCW **49.17.120** or **49.17.130**, the

department, within a reasonable time after the termination of such inspection or investigation, shall notify the employer using a method by which the mailing can be tracked or the delivery can be confirmed of the penalty to be assessed under the authority of RCW **49.17.180** and shall state that the employer has fifteen working days within which to notify the director that the employer wishes to appeal the citation or assessment of penalty. If, within fifteen working days from the communication of the notice issued by the director the employer fails to notify the director that the employer intends to appeal the citation or assessment penalty, and no notice is filed by any employee or representative of employees under subsection (3) of this section within such time, the citation and the assessment shall be deemed a final order of the department and not subject to review by any court or agency.

Pursuant to this RCW, the appealing party is required to submit an appeal within 15 working days. Sending an email is an acceptable way to submit the appeal. In this case, the evidence presented before the Board established that the January 8, 2019, appeal emailed to the Department by Kast was received by the Department the same date it was sent. The email that Kast sent was received by the Washington State Department of Labor and Industries at lni.wa.gov on January 8th and again on January 24th, 2019. The email was sent to the Department and received at its

domain address. The email was sent and no receipt of delivery or message that it was undeliverable was returned. Despite a portion of the email address being typed incorrectly (the username), the Department did in fact receive the email with the appeal of the Citation on January 8, 2019, within the fifteen-day deadline. The appeal was properly submitted to the Department, and the Appellant substantially complied with the statutory regulations for timely filing of the appeal.

A. The Timely Appeal of the Citation

Kast substantially complied with the requirements imposed by RCW 49.17.140(1) in his January 8, 2019, appeal of the Citation and therefore, the Appellant's appeal should be considered timely.

The courts have recognized minor errors when substantial compliance satisfies the spirit of a procedural requirement. (*Black v Dep't of Labor & Indus.*, 131 Wn.2d 547, 552, 933 P.2d 1025). Kast is accustomed to submitting information to the Department on a regular basis and with every other report or

document submitted to the Department, Kast receives some sort of acknowledgement of its receipt or a response that the submittal was undeliverable. Delivery and notice of receipt of the Appeal on January 8, 2019, was implied by Kast's actions.

The Appellant submitted the appeal within the mandated timeframe and in an acceptable manner to the Department. A typographical error in the user-name portion of the email address may have delayed the processing of the appeal by the individual who monitors correspondence received at DOSHAppeal but does not change the fact that the appeal was submitted within the statutory time limits.

Based on this information, this Court should find the January 8, 2019, notice of appeal to the Department was a timely appeal to the Citation given the Appellant's substantial compliance with RCW 49.17.140.

The Department Should be Estopped from Arguing

Defect in Service Constitutes an Untimely Appeal

At the time of this Appeal, the Department had made a choice to program its computer system so as not to notify an email sender that its email to DOSHAppeals@lni.wa.gov was undeliverable due to an error in the username in the email, thus depriving employers like Kast of the opportunity to correct a typographical error when they have otherwise substantially complied with their statutory obligation. The Department should be estopped from arguing that the obligation falls to the party sending the email to discover it has made an error, preventing them the opportunity to have the underlying case heard.

RCW 49.17.140 requires that the Department shall notify the employer using a method by which the mailing can be tracked, or the delivery can be confirmed yet the Department did not require this or provide a mechanism for confirmation when employers were submitting appeals. Kast submits numerous reports and filings to the Department regularly and in every other

case receives an electronic acknowledgement of receipt of those submittals.

The elements of equitable estoppel are: (1) an act or admission by the first party that is inconsistent with a later assertion; (2) an act by another party in reliance upon the first party's act or admission; and (3) an injury that would result to the relying party if the first party were not estopped from repudiating the original act or admission. (*Kramarevsky*, 122 Wash.2d at 743, 863 P.2d 535).

The Department should be estopped from arguing that the Appeal was not properly delivered and timely when it was their decision to not set up a mechanism to notify users of errors. Based on extensive history in submitting reports and other filings with the Department and the follow up acknowledgement of receipt or notice of non-delivery, delivery and receipt could be implied by Kast's action in submitting the Appeal. The Department provided no notification that delivery

was not made to the Director. That inaction would lead to a reasonable assumption that no error had occurred, and the email was received. Kast relied on this inaction to mean that delivery was properly made. Most importantly, Kast will be greatly injured if not allowed to have the underlying case heard.

Equitable estoppel protects one party from being harmed by another's voluntary conduct. The rationale behind estoppel is to prevent injustice owing to inconsistency. The inconsistent actions of the Department in not providing a mechanism to notify senders that an email to DOSHAppeals@lni.wa.gov was undeliverable and leaving emails that were received at the Department but undeliverable to a specific individual due to an incorrect username unforwarded, harms the party who is acting in good faith and inadvertently makes a typographical error.

In this case, the Department failed to provide any notice that the January 8, 2019, email was not or could not be transmitted to the DOSH appellate office. Nor did the

Department return the electronically submitted appeal as undeliverable, thus providing a proper opportunity to resubmit the appeal. The Department should be estopped from arguing that a typographical error in the submittal of an appeal precludes an appeal from being filed in a timely manner when the Department has actually received the email.

It should be noted that since Kast initiated the appeal process, the Department has made changes to the electronic appeals process. Individuals and/or businesses submitting an electronic appeal to the Department now receive a non-deliverable message if there is an error in the email address. It is clear that the Department became aware of the flaw in the process. A Department that chose a system that failed to notify individuals of simple typographical errors should not be allowed to use those errors to deprive individuals of their right to have their Appeal heard.

CONCLUSION

The January 8, 2019, electronic appeal was submitted to the Department in a timely fashion, and substantially complied with the requirements of the statute. The Department should be estopped from having procedures that fail to forward appeals and fail to notify appealing parties of confirmation of properly filed appeals, then argue that the burden is on that appealing party to know the appeal would not be forwarded and was not properly filed.

Based on the above-mentioned reasons, as well as the rules and case law, the Appellant respectfully requests this Court reverse the August 30, 2021, Order of the Superior Court and the August 1, 2019, Board Decision and Order and find that the Appellant timely appealed the January 8, 2019, Citation.

This brief complies with RAP 18.17 (b) – word count using the software count = 2,048.

RESPECTFULLY SUBMITTED this 23rd day of August,
2022.

Armin Kast dba
Kast Painting and Light Construction
2159 Rice Road
Chehalis, WA 98532

A handwritten signature in cursive script, reading "Armin Kast", is written over a horizontal line.

Pro Se

ARMIN KAST

August 25, 2022 - 4:59 PM

Transmittal Information

Filed with Court: Court of Appeals Division II
Appellate Court Case Number: 56436-0
Appellate Court Case Title: Armin W. Kast dba Kast Painting & Light Constr., Appellant v. Labor and Industries, Respondent
Superior Court Case Number: 19-2-01078-7

The following documents have been uploaded:

- 564360_Briefs_20220825165521D2711729_1890.pdf
This File Contains:
Briefs - Appellants
The Original File Name was Appellants Brief Armin Kast No 56436.pdf

A copy of the uploaded files will be sent to:

- williamf.henry@atg.wa.gov

Comments:

Sender Name: Armin Kast - Email: kastingthenet@juno.com
Address:
2159 Rice Rd.
Chehalis, WA, 98532
Phone: (360) 740-0644

Note: The Filing Id is 20220825165521D2711729